

Australian Consumers' Association
comment to the
Copyright Law Review Committee
Reference on the
Relationship between copyright and contract law¹

Introduction

The Australian Consumers' Association (ACA) is a not-for-profit, non-party-political organisation established in 1959 to provide consumers with information and advice on goods, services, health and personal finances, and to help maintain and enhance the quality of life for consumers. The ACA is funded primarily through subscriptions to its magazines, fee-for-service testing and related other expert services. Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests.

ACA also publishes CHOICE magazine, with a subscriber base in the region of one hundred and twenty thousand and Computer Choice, a leading home technology magazine, with a subscriber base of over eighteen thousand. ACA also publishes a range of Australian books under the imprint CHOICE Books and has a website (see www.choice.com.au). Therefore, the ACA is actively involved in the information industry, and is aware of and informed about many of the issues and dilemmas in the area.

The ACA welcomes the reference on this topic to the Copyright Law Review Committee as timely and relevant. There is a state of almost panic in business about the fate of intellectual property (IP) in the digital world. It is almost as if Scott McNealy had declared in his famous statement "You already have zero copyright. Get over it"; whereas what he was actually quoted as saying was, "You have zero privacy. Get over it."² There are some curious conjunctions thrown up by the move toward a digital economy, and that between privacy and copyright is one of the more unusual and therefore more interesting.

Commentators speak of "the end of copyright", suggesting some kind of free for all, where intellectual property has no protection and copying is rife. In our view, the opposite is more likely. The end of copyright is likely to be the far more rigorous control of access to intellectual property, not using the mechanisms of copyright law, with its guarantee of consumer rights, but via technological and contractual means which give the IP holder great control and leave a much slimmer margin for consumer interests. This could prove an important tool for business seeking premiums, but ultimately as will be pointed out, a potentially disastrous and self limiting feature of the convergent information revolution.

An important part of the plans of commercial IP holders, and part of their antidote to the fear of copying is an attachment to the personal details of their users. As Oliver Freeman, Vice President of the Australian Publishers Association was quoted as saying in the Sydney Morning Herald, "Far from being a threat to authors' copyright,

¹ ACA File reference 010 09312; 10 August 2001

² Cited by Ben Hills SMH 14/8/99 Spectrum P4 (widely cited elsewhere)

the Internet opened up possible new revenue models ... Anything which can take an electronic charge, like a chapter of text which has been created or captured digitally, can communicate vital information about the transactions of which it is part – where it is, who the user is, whether it is being copied and so on.”³

What he is foreshadowing are intrusive rights management systems that could monitor people’s use of information, possibly on a worldwide basis. As content gets broken into smaller and smaller units, each of which can be charged and accounted for separately and tracked individually you get computer based compliance and movement tracking with a robotic efficiency, automatic micro-enforcement. At the very least, consumers must be well aware and informed of what information is collected, how it is to be used for, and why is it necessary to collect it at all. Absolutely important is that data must not be collected covertly. There is a real opportunity for online technology to do this, and therefore threats exist for consumers. Examples of this have emerged.

- RealNetworks Inc. acknowledged in 1999 that information from its free RealJukebox software -- used by more than 12 million people⁴ -- was sent over the Internet to its headquarters.
- Wired News reported in August 1999 was that Amazon.com set up shopping communities which let anyone view books, movies and CDs ordered by Amazon.com customers at corporations, non-profit groups and government agencies.⁵ So anybody can see who has bought what. The trouble was that Amazon did not ask groups for permission before using employees' and members' orders to create the corporate profiles that appear on its web site.
- Double click and its collection of consumer information on the Internet using browser cookies has caused widespread alarm
- Software devices called Trojan Horses have been found loaded surreptitiously on consumer computers. A recent story in Salon online magazine documented the author’s experience of what he termed ‘Software that can spy on you’. He asked “Why did Mattel include technology that can encrypt and send data to and from your PC in its children's CD-ROMs?”⁶ He noted:

It’s pretty easy to see how such technology could cause problems. If it wanted, the company could scan your hard drive for competing products, then flood you with offers to purchase its own similar products, or even just use that info for competitive research. Once this kind of capability is introduced, it could also be misused by a rogue employee to retrieve your financial records or credit-card numbers ... Meanwhile, the ubiquitous Internet connectivity afforded by cable modems and DSL will make it harder and harder for us to know when these sorts of programs are active.
- Web Bugs (also known as single-pixel gifs) have recently caused a stir as an adjunct to surreptitious data collection. They are computer code, in Web pages nearly identical in structure to the code for a picture or a banner ad.

³ Kate Crawford Digital no threat to copyright SMH 4/6/99

⁴ <http://www.usatoday.com/life/cyber/tech/ctg550.htm>

⁵ Wired News 25 August <http://www.wired.com/news/business/story/21417.html>

⁶ <http://www.salon.com/tech/col/garf/2000/06/15/broadcast/index.html>

Except they are invisible. Using web bugs companies can track people on pages without banner ads⁷.

- The US Privacy Foundation has discovered that it is possible to add "Web bugs" to Microsoft Word documents and has published an advisory to that effect⁸. A "Web bug" could allow an author to track where a document is being read and how often. In addition, the author can watch how a "bugged" document is passed from one person to another or from one organization to another.

Technology makes possible the micro penetration of control with consequent threats or impacts on consumer privacy and control of their lives. The artificial feature that IP holders are busily building in the blank featureless convergent landscape is the encryption barrier, which can enforce potentially onerous contractual terms (more of that later). The information products that consumers need may become hidden away behind ramparts of technology. Besides encryption, there are login procedures, software/hardware combinations, anti-copying devices, electronic 'watermarks', etc. These have the capacity to become what Professor Bernt Hugenholtz, University of Amsterdam termed 'digital roadblocks'⁹.

Indeed there are those who fear the trend of control by technology and contract could culminate in a regime of *lex informatica*¹⁰, where judge jury and executioner would all be embodied in the functions of computer code, dispensing precise and instant automated law, with prescription, policing and enforcement rolled into one neat binary package.

However, relying on contract and technology, in our estimation, undermines consumer protection – the failure and unfairness of relying on contracts epitomises the imbalance of power between consumers and business. Amongst other problems, consumers lack the ability to meaningfully negotiate terms. As Professor Hugenholtz, University of Amsterdam put it, "Freedom of contract may become contractual coercion, especially when dominant undertakings abuse their market power to impose contractual rules on powerless consumers, as if they were public authorities."¹¹ It was precisely this poverty of protection in contract that led to the evolution of consumer protection laws and regulations in the off-line world. Their analogue will be required on-line.

Fundamental among the mechanisms of legislative redress is the prohibition on contracting out of key consumer rights – warranty under the Trade Practice Act springs to mind. In our view this is required as the forces outlined above threaten the copyright regime. For example restriction on access to circumvention devices leads to an erosion of the consumers capacity to exercise their right of access independent of

⁷ Brills Content, July 2000 DoubleClick watches Porn/Medical Sites By Mark Boal

⁸ <http://www.privacyfoundation.org/advisories/advWordBugs.html>

⁹ Professor Bernt Hugenholtz Copyright, contract and technology - What Will Remain of the Public Domain? Copyrites - Issue 31 The Newsletter of the Intellectual Property Branch Department of Communications, Information Technology and the Arts

¹⁰ Joel R. Reidenberg, 'Lex Informatica: The formulation of information policy rules through technology', Texas Law Review (76)

¹¹ Professor Bernt Hugenholtz Copyright, contract and technology - What Will Remain of the Public Domain? Copyrites - Issue 31 The Newsletter of the Intellectual Property Branch Department of Communications, Information Technology and the Arts

copyright holder control, particularly in the absence of any provision to protect the permitted uses under the exceptions in the Copyright Act from being overridden by contract. To redress the impact of the protection and advancement of technological protection measure that can operate in excess of the rights granted to copyright holders, we argued for a measure of contractual protection extended to consumers. Consequently it was our recommendation to the review of the Digital Agenda Bill that

There should be general provision in the Act to ensure that uses permitted under the exceptions in the Copyright Act cannot be avoided by contractual means.¹²

The ACA subsequently proposed that the Bill embody a clause to the effect that:

An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of sections 28, 40, 41, 42, 43, 47B, 47C, 48A, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 104A, 110A, 110B, Part VA has no effect.¹³

We would draw these recommendations to the attention of the CLRC.

We would also draw the attention of the Committee to the intrusion of criminal law into this domain, as argued in the Submission of the Legislative Watch Sub-Committee of The New South Wales Society for Computers & the Law in relation to the Crimes Amendment (Computer Offences) Bill 2001, which closely resembles the Commonwealth Cybercrime Bill recently introduced. They observed:

1.2 It will not be overly difficult for skilled lawyers to bring data within the ambit of these provisions, effectively creating an alternative regime to the laws relating to copyright and confidentiality for the protection of information. This new regime will not reflect the complex balancing of interests found in existing laws such as those relating to copyright and breach of confidence.

1.3 For example, if the ability to licence or not is taken as informing the meaning of "authorise" this will have the practical effect of greatly expanding the protection of data beyond that contemplated by the Copyright Act. For example, should a copyright holder distribute books electronically, those electronic books could be encapsulated in such a way as to criminalize access which would otherwise have been permitted as an exception (such as fair dealing) to a copyright holder's monopoly, in effect removing the public benefit of the fair dealing exceptions. In the long run, it may provide an

¹² Submission by Australian Consumers' Association to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Copyright Amendment (Digital Agenda) Bill 1999

¹³ Supplementary Submission 28 October, 1999 by Australian Consumers' Association to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Copyright Amendment (Digital Agenda) Bill 1999

avenue for owners of copyright to convert civil enforcement costs into a cost to be borne by the community through criminal offences.¹⁴

General concern with the inadequacy of Australian common and Trade Practices law to provide effective remedy for one-sided contracts the contents of which the consumer has scant capacity and opportunity to negotiate. We would refer the Committee specifically to the discussion of the EU Directive 93/13/EEC on Unfair Terms in Consumer Contracts was enacted by the European Union (EU) in 1993 as implemented in the United Kingdom by the Unfair Terms in Consumer Contracts Regulations 1994 and 1999 in the recent report by the Communications Law Centre, *Unfair Practices and Telecommunications Consumers*. While this review is in the context of unfair contract terms in Australian telecommunications, it is particularly germane to the reference of the CLRC since:

The primary focus is the terms of “standard form” contracts, where the consumer has little, if any, effective opportunity to influence the terms of the contract.¹⁵

This is directly related to the click/shrink-wrap contract problem. What this CLC report does is establish just how scanty the protection offered to Australians is. This inadequate protection is mirrored in the IP area.

In terms of non-electronic contractual over-ride of copyright exceptions, it is worth glancing at the copyright notice mantra at the head of virtually any book.

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical ... without prior permission in writing from the publisher.

Presumably such terms printed in the frontispiece are intended to govern the sale and use of the book and therefore form part of the contract of sale. On their face, they purport to oust any form of copying, allowed or otherwise. They make no reference to or exception for the statutory and other rights of the buyer. In our view, such contracts are analogous to click-wrap contracts in the non-electronic world, and should be required to acknowledge the rights of buyers. Those rights should be inalienable, as described above.

¹⁴ Submission of the Legislative Watch SubCommittee of The New South Wales Society for Computers & the Law in relation to the Crimes Amendment (Computer Offences) Bill 2001 <http://nswscl.socialchange.net.au/home/crimebill.html>

¹⁵ *Unfair Practices and Telecommunications Consumers* Communications Law Centre 2000
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